IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 488 OF 2005

1. Rampyare Bharat Dubey]
age 75 years]
2. Triloknath Rampyare Dubey]
age 52 years]
3. Budhi Rampyare Dubey]
age 48 years,]
all of Bombay, Indian Inhabitant]
serving at M/s. S. S. Mishra]
Flour Mill, situated at Shop]
No.1, ground floor, Parsi]
Panchayat Road, B.A. Bhatt Chawl]..Appellants
Andheri (E), Mumbai 400 069](Ori.Defendants)

versus

1. Surya Narayan Shyamnath]
Mishra, died his L.R.]
1(a) Prasannakumar Mishra]
aged about 54 years,]
Occupation Business, residing]
and carrying on business at]
M/s. S. S. Mishra Flour Mill,]
B.A. Bhatt Chawl,]
Parsi Panchayat Road, Andheri(E)]
2. Municipal Corporation of Gr.]
Bombay, having its Head Office]

at Mahapalika Marg, V.T. Bombay]Resp.1(Ori.Plff.)

3. Bombay Suburban Electricity]Resp.2 & 3
Supply Ltd. Nagin Mahal,](Ori.Deft. 4&5)
Churchgate, Mumbai 400 020]..Respondents

Mr. P. M. Vyas for the Appellants.
Mr. R. R. Sharma for the Respondent No.1.
None for Respondent Nos. 2 and 3.

CORAM : D. G. DESHPANDE,J.

DATE : 3RD OCTOBER,2005

ORAL JUDGMENT :

1. Heard learned counsel for the appellants and the respondent No.1.

2. Appellants are the original defendant Nos. 1 to 3. Plaintiff filed a suit for a declaration that he is owner of the flour mill styled as M/s. S. S. Mishra Flour Mill and the defendant Nos. 1 to 3 should be perpetually restrained from causing obstruction in the business of the plaintiff. The defendant Nos. 1 to 3 opposed the suit contending that they are tenants, that they have filed Suit No. 1345 of 1995 before the Small Causes Court. According to the defendant, one Vidyabai Bhat was the landlady of the premises to whom the defendants used to pay Rs.30/- per month as rent. Therefore,

defendant No.1 was a protected tenant. He was paying electricity charges. He is in possession of shop and carrying on business. It was further pleaded that so far as flour mill is concerned licence to run flour mill was in the name of the plaintiff, but the defendants were running the same by using the licence of the plaintiff for which defendants were paying Rs.500/- per month to the plaintiff. Receipts were also issued by the plaintiff and therefore on this count the suit was opposed.

3. In the suit filed by the plaintiff, the plaintiff had taken out Notice of Motion No. 2110 dated 24.9.1997 for directing the defendants to deposit certain amount in the court. City Civil Court on 17.2.1999 directed the defendants to deposit Rs.10,000/- per year. There were also directions for the defendants to renew the licence. The defendants did not deposit the amount for the year 2004. Then plaintiff took out another Notice of Motion No. 2355 of 2004 for striking off the defence. That was allowed by the court and the defence was struck off. The defendants then took out Notice of Motion No. 4150 of 2004 for recalling the order dated 13.7.2004 but that notice of motion was also dismissed. Then the court granted decree after considering the evidence adduced by the

plaintiff, and, hence this appeal.

4. In this appeal what is mainly challenged are the orders of the courts below striking off defence of the defendants - appellants. There are four orders in that regard. They are dated 17.2.1999, 6.9.1999, 13.6.2000 and the final order of striking the defence that came to be passed on 13.7.2004.

5. The first order dated 17.2.1999 is passed by Judge Dholakia of the City Civil Court, in Notice of Motion No. 2110 dated 24.4.1997. There is reference to the earlier notice of motion of the plaintiff bearing No. 5880 of 1995 which was decided by Judge Bhangale by an order dated 23.12.1996 and the defendant Nos. 1 to 3 were directed to deposit in the court Rs.15/- per electricity unit consumed, minus outgoings and expenses of the business and the order was still in force till 17.2.1999. This notice of motion was taken out by the plaintiff alleging that the defendants have committed breach of the order dated 23.12.1996 by failing to deposit Rs.7,000/- which had become due by that time. In paragraph 6 of that order the learned Judge noted that the case of the defendants is that of the intention to deposit but the controversy was regarding the expenses which the defendants were entitled to deduct under the said

order. The court ultimately modified the order dated 23.12.1996 and directed the defendants to deposit Rs.10,000/- per year on or about 10th January of each year. It further directed that the amount for the year 1997 and 1998 i.e. Rs.20,000/- be deposited on or before 31.3.1999 and rest of the directions in order dated 23.12.1996 were to continue. This Notice of Motion No. 2110 dated 24.4.1997 was disposed of accordingly.

6. Then second order dated 16.9.1999 came to be passed which noted that the defendants have paid Rs.30,000/- and both the parties agreed that all the licences for the suit business shall be renewed by the defendants but shall not be transferred in the name of any of the defendants pending the suit. BMC was directed to renew all the licenses. The defendants were further directed to pay the rent, electricity bills, licence fee and all expenses of the business promptly.

7. Then the third order dated 13.6.2000 came to be passed. It was a Contempt Notice of Motion No. 521 of 2000 taken out by the plaintiff for flouting the order dated 17.2.1999 and also with a prayer to strike of the defence because the defendants have not complied with the order, have not renewed the licence or permits and the certificate of

registration.

8. The Court i.e. Smt. R. P. Sondur Baldota of the City Civil Court noted that defendants have not deposited amount in the court as per the order dated 17.2.1999. The contention of the defendants was that because of the old age he could not deposit the amount as he was unwell. It was pointed out that the arrears of royalty for the earlier years also came to be deposited only after the Contempt Notice of Motion was taken out by the Plaintiff. The Court hold that *"Since breach of the order is restricted to the payment of the yearly royalty, I am not inclined to take any action against the defendants for contempt but give final opportunity to the defendants to deposit the amount in court within one week."* The Court warned that if the defendants fail to deposit the amount, the plaintiff will be entitled to have the defence struck off. The court also found that the plaintiff was entitled to costs of the notice of motion considering the conduct of the defendants. So time up to 20.6.2000 was granted to deposit amount of royalty and also to pay costs of Rs.1,000/- and the Contempt Notice of Motion No. 521 of 2000 was disposed of. Prayer (b) of the Notice of Motion in failure was made absolute.

9. Then came the final i.e. fourth order dated 13.7.2004 in Notice of Motion No. 2355 of 2004 that was for non compliance of three earlier orders dated 17.2.1999, 16.9.1999 and 13.6.2000. The reply of the defendants No.1 has been considered in this order in paragraph 3, there again plea of the defendant No.1 that he is 75 years of age and is not keeping good health, suffering from heart trouble and he is ready and willing to comply with the order though he could not deposit the amount within time. Regarding renewal of licence, the defendant No.1 contended that he had prepared application for renewal of the licence but due to objection of the plaintiff, the BMC did not renew the licence. The court could not accept the contention of the defendants and came to the conclusion that there was non compliance to the order of the court i.e. regarding all the three orders, even the cost of Rs.1,000/- was not paid by the time stipulated by the court. Therefore, court ultimately allowed the Notice of Motion and struck off the defence.

10. The Plaintiff thereafter led his evidence. Witnesses of the plaintiff were cross examined by the defendants. They made their submissions before the court and ultimately suit came to be decreed. It is in this background that the present appeal is filed.

11. Counsel for the appellants contended that now all the arrears have been deposited and paid, and the licences could not be renewed because of the objections by the plaintiff. According to him striking off the defence is a discretionary power given to the court and the lower court erred in exercising the discretion in favour of the plaintiff without considering the old age of the defendant No.1, his inability to pay the amount within time and inability to get the licence renewed. He further contended that striking off the defence is a drastic action and the court should not have taken that step considering the facts on record.

12. On the other hand Mr. Sharma pointed out that not only once, but repeatedly the defendants are guilty of breach of the orders, they did not even pay the electricity charges as directed by the court. They tried to find out a loophole in the orders and avoided paying the amount at the Rs.15/- per unit electricity consumed, then when the direction was given to deposit Rs.10,000/- per year within the stipulated period without committing defaults, then further the court gave them one opportunity and directed them to deposit the amount along with costs, there also they committed default. Therefore, it is nothing but an attempt by the

defendants - appellants to seek extension of time one after the other by appealing to the humanitarian aspects of the matter and the defendants, who are guilty of recklessness, total negligence and in a sense fraud practised on the litigant and the court by not complying with any of the orders in time, was rightly punished by striking off the defence. Mr. Sharma also contended that in the situation that was before the court at the time of passing of the final order, striking off the defence the court had considered the entire conduct of the defendants / appellants and when it was found that there was no option but to strike off the defence, the order came to be passed. Mr. Sharma also argued that those orders of striking of the defence were not challenged by the defendant No.1, they have become final and therefore now for the first time, those orders cannot be challenged, and, even if they are challenged the appeal cannot be entertained by setting aside the judgment and decree of the lower court.

13. On merits, Mr. Sharma contended that the defendants filed a suit before the Small Causes Court against the earlier owner vide R.A.D. Suit No. 911 of 1995 and he has admitted that he has paid to the earlier landlord on behalf of the plaintiff. That suit came to be dismissed on

6.10.1999. Then the plaintiff preferred an appeal, that also came to be dismissed on 28.6.2001. Mr. Sharma pointed out that from 1996 till this date the defendant No.1 did not renew the licence and entire claim and contention of the plaintiff, is totally false and bogus. Mr. Sharma also pointed out that the plaintiff never opposed transfer of licence. He also showed that the appellants had no proof with them to show that the plaintiff ever objected to the transfer of licence. He further argued that when the court has cast responsibility on the defendant No. 1 to get the licence renewed, and, if actually the defendants / appellants had so applied and the plaintiff had objected, then it was open to the defendant No.1 to make immediate grievance to the court because conduct of the plaintiff in such a case would have amounted to obstructing the course of justice or obstructing in the compliance of the orders of the court. No such complaint was ever made by the defendant No.1 to the City Civil Court till the decree came to be passed against the plaintiff, therefore according to Mr. Sharma the entire case and defence of the appellants, is false and bogus. Appellants have least regards for the orders of the court, they tried to utilise the situation maximum to their benefit even by disregarding the orders of the court and therefore they are not entitled for any indulgence.

14. The question is whether order of striking off the defence was proper, and, is liable to be interfered with. My answer is in the negative. The conduct of the defendants - appellants, as noted by me, and noted by the different orders of the City Civil Court, as quoted above, clearly shows that he has no regard for the orders of the court. It is his tendency to flout the orders of the court repeatedly and not to comply with them. The contention raised by the appellant No. 1 that he was a man of old age and suffering from heart trouble, were also made before me, so these contentions are being raised by him from 1996 onwards i.e from the date of filing of the suit to avoid his liability to comply with the order of the court. The flour mill business runs cash every day and even inspite of that the defendants never complied with the orders of the court within time. It is flagrant breach of the orders of the court, striking off the defence, was most appropriate, which the court could have and should have done and has been done against the defendants / appellants. The conduct of the defendants is reflected by and noted above, does not deserve any indulgence. The discretion of striking off the defence was exercised by the court in a most appropriate circumstances, there cannot be any graver situation than the

present one and no option to the court but to strike off the defence. It is pertinent to note that even before this court the appellants tried to raise the dispute as to the amount due, how much is deposited and how much had remained to be deposited.

15. Regarding the merits of the matter, the appellants have absolutely no case. In order to fortify this contention, Mr. Sharma drew my attention to the plaint of the appellants before the Small Causes Court in R.A.D. Suit No. 911 of 1995, that suit was filed by him against Smt.Kaumudi Pratapbhai Kothari, Nanaji Jivraj Karani and Suryanarayan Mishra. He has stated that the plaintiff is residing and carrying on business of flour mill in shop No.1 and that is the suit premises. The original plaintiff is the owner of the flour mill. As against this, in the present suit case of the defendants was of protected tenants of the premises, but that contention was stand negatived and rejected on account of dismissal of the defendants suit before the Small Causes Court and also consequent disposal of his Appeal. Therefore the issue of tenancy which the defendants are now trying to raise, has come to an end, and is against the defendants. Then the contention that defendant No.1 was paying Rs.500/- per month to the plaintiff for using the plaintiff’s licence for the

flour mill, this is also without any proof.

16. According to Mr. Sharma inspite of this specific pleadings, the appellant No.1 is now contending that he is owner of the flour mill business. This stand of the defendant No.1 - appellant No.1 is totally contradictory to his earlier stand. Therefore, the appellants have no case on merits. This is also not a case to interfere with the order of striking off the defence. As a result, the appeal is required to be dismissed. From the conduct of the appellants, it is clear that their defences are false, vexatious, therefore plaintiff is required to be compensated with damages.

17. In the result, I pass the following order:

ORDER

. Appeal is dismissed with costs throughout and compensatory costs of Rs.10,000/-.

3.10.2005 (D.G. DESHPANDE, J.)